Supreme Court, U. S.
FILED
JUN 25 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1868

NATIONAL GEOGRAPHIC SOCIETY, *Appellant*,

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Appellee.*

On Appeal from the Supreme Court of California

JURISDICTIONAL STATEMENT

ARTHUR B. HANSON
FRANK M. NORTHAM
HANSON, O'BRIEN, BIRNEY & BUTLER
888 Seventeenth Street, N.W.
Washington, D. C. 20006

Attorneys for Appellant

Of Counsel:

MICHAEL N. KHOURIE
EUGENE C. CREW
THOMAS PAINE
BROAD, KHOURIE & SCHULZ
One California Street
San Francisco, California 94111

GLENN L. ARCHER, JR.
MICHAEL C. DURNEY
HAMEL, PARK, MCCABE & SAUNDERS
1776 F Street, N.W.
Washington, D.C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 4

STATEMENT 5

Statement of Facts 5

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW 9

THE QUESTIONS ARE SUBSTANTIAL 12

THE IMPOSITION OF USE TAX COLLECTION LIABILITY UPON AN OUT-OF-STATE ORGANIZATION, WHICH HAS NO RETAIL OUTLETS OR RETAIL SALES SOLICITORS WITHIN THE TAXING STATE AND WHOSE ONLY CONTACT WITH CUSTOMERS IN THE STATE IS THROUGH THE UNITED STATES MAIL, IS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION 13

A. The Existence of Two Offices In The Taxing State, Which Are Part Of An Activity Specifically Exempted From Tax By The State And Which Are Dissociated From The Transaction Sought To Be Taxed, Does Not Provide The Minimal Nexus Required To Impose A Use Tax Collection Liability On An Out-Of-State Seller's Mail Order Sales 15

B. The "Slightest Presence" Test Formulated By The California Supreme Court Is In Conflict With This Court's Decision In Miller Bros. Co. v. Maryland 22

C. The Substantiality Of An Out-Of-State Seller's Mail Order Business Within A State Attempting To Impose Use Tax

Page

Collection Liability On The Seller Is Of No Significance In Determining Whether Imposition Of The Tax Liability Is Constitutional 23

CONCLUSION 25

APPENDICES TO THE BRIEF

APPENDIX A: Opinion of the Supreme Court of California 1a

APPENDIX B: Opinion of the Court of Appeal of the State of California, First Appellate District 17a

APPENDIX C: Constitutional and Statutory Provisions Involved 34a

APPENDIX D: Notice of Appeal 37a

TABLE OF CITATIONS

CASES:

American Oil Co. v. Neill, 380 U.S. 451 (1965) ..3, 14, 15, 19, 20

Diamond National Corp. v. State Board of Equalization, —— U.S. ——, (No. 75-1038, decided April 19, 1976) 25

General Trading Co. v. The State Tax Commission, 322 U.S. 335 (1944) 14, 21

Miller Brothers Co. v. Maryland, 347 U.S. 340 (1954) .....*passim*

Montgomery Ward & Co., Inc. v. State Board of Equalization, 272 CA2d 723, 78 Cal. Rpts. 373 (Ct. App. 1st Dist. 1969), *cert. denied,* 396 U.S. 1040 (1970) 16, 22

National Bellas Hess v. Department of Revenue, 386 U.S. 753 (1967) 2, 13, 15, 24

Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941) 14, 17, 18, 19, 21

Page

Norton Co. v. Department of Revenue, 340 U.S. 534 (1951) 14, 15

Scripto v. Carson, 362 U.S. 207 (1960) 14, 21

Standard Pressed Steel Co. v. Washington Revenue Department, 419 U.S. 560 (1975) 21

Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965) 3

OTHER AUTHORITIES:

HOUSE COMM. ON THE JUDICIARY, REPORT OF THE SPECIAL SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE, H.R. Rep. No. 565, 89th Cong., 1st Sess. 625-38 (1965) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. ——

NATIONAL GEOGRAPHIC SOCIETY, *Appellant*,

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

JURISDICTIONAL STATEMENT

This is an appeal brought by the National Geographic Society from the decision of the Supreme Court of California upholding the imposition by the Board of Equalization of the State of California of use tax collection liability on the Society's mail-order sales to California residents.

The opinion of the Supreme Court of California is based upon a test of "slightest presence within such taxing state" without regard to the nature of such presence, a test which has never been adopted by this Court and is flatly contrary to the holding of this Court in *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340 (1954) as will be illustrated hereinafter. The Su-

preme Court of California's opinion is not only contrary to *Miller Bros.*, but in light of the facts set out by stipulation, flies in the face of this Court's opinion in *National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753 (1967).

Substantial justice requires that the opinion of the Supreme Court of California be set aside and the opinion of the Court of Appeal of California, First Appellate District, unanimously holding in favor of the Society on March 26, 1975, be reinstated. To permit the holding of the Supreme Court of California to stand would have far reaching effects country-wide on use tax collection liability for all retail sales made by interstate mail.

OPINIONS BELOW

The opinion of the Supreme Court of California is reported at — Cal.3d —, 128 Cal. Rptr. 682 (1976) and is set forth in Appendix A. The opinion of the Court of Appeal of the State of California, First Appellate District, is unofficially reported at 121 Cal. Rptr. 77 (1975) and is set forth in Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 29 U.S.C. § 1257(2). This appeal challenges the validity of requiring the National Geographic Society (hereinafter "Society") to collect and pay over California's use tax (California Revenue and Taxation Code §§ 6201-6204, set forth in Appendix C) on its mail-order sales to California residents on the ground that imposition of use tax collection liability on such sales is repugnant to the Constitution of the United States.

In 1964 the Board of Equalization of the State of California (hereinafter "Board") notified the Society that it was obligated, under California Revenue and Taxation Code § 6203, to collect use taxes on merchandise sold by mail to California residents, and that, since the Society had not collected such taxes, it was liable for an equivalent sum under § 6204. The Society paid the assessment under protest and brought an action in the San Francisco Superior Court seeking a refund, claiming that the imposition of use tax collection liability was violative of the Due Process Clause and the Commerce Clause of the Constitution of the United States. After trial without a jury and upon stipulated facts, the Superior Court entered an amended judgment in favor of the Society and ordered the Board to refund $3,864.33.

On appeal to the Court of Appeal of the State of California, First Appellate District, this judgment was unanimously affirmed on March 26, 1975. On April 25, 1975, a petition for rehearing was denied. On appeal, the Supreme Court of California, IN BANK (sic), reversed the judgment on April 1, 1976 and remanded for entry of judgment in favor of the Board. Timely notice of appeal to this Court was filed in the Supreme Court of California on June 17, 1976. The notice of appeal is set forth as Appendix D.

As the Supreme Court of California explicitly rejected the Society's challenge to imposition of the use tax collection liability under California Revenue and Taxation Code §§ 6201-6204, this matter is appropriately brought to this Court by appeal. See, *e.g., Warren Trading Post Co.* v. *Arizona Tax Commission,* 380 U.S. 685 (1965); *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965).

In the event this Court does not consider appeal the proper mode of review, the Society requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §§ 1257(3) and 2103.

QUESTIONS PRESENTED

1. Whether imposing use tax collection liability upon an out-of-state organization, which has no retail outlets or retail sales solicitors within the taxing state and whose only contact with customers in the state is through the United States mail, violates the Due Process Clause and the Commerce Clause.

2. Whether the existence of two offices in the taxing state, which are part of an activity specifically exempted from tax by the California statute (California Revenue and Taxation Code § 6362(a)) and which are dissociated from the transactions sought to be taxed, provides the minimal nexus required to impose a use tax collection liability on an out-of-state seller's mail order sales.

3. Whether the "slightest presence" test formulated by the California Supreme Court conflicts with this Court's decision in *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954) and other cases decided by this Court.

4. Whether the substantiality of an out-of-state seller's mail order sales within a state attempting to impose use tax collection liability on the seller is of any significance in determining whether the imposition of the collection liability is constitutional.

STATEMENT

The Society seeks review of a holding of the Supreme Court of California in favor of the Board rendered on April 1, 1976, in an action brought by the Society to recover certain asserted use tax collection liabilities paid by the Society to the Board under protest and for a declaration of nonliability for use tax collection.

Statement of Facts

The National Geographic Society is a non-profit scientific and educational organization incorporated in 1888 under the laws of the District of Columbia with its administrative offices located at 17th and M Streets, N.W., Washington, D. C. The Society is not registered to do business in the State of California and does not engage in activities in the State of California which would require the Society so to register.

The Society is exempt from federal income taxation by reason of section 501(c)(3) of the Internal Revenue Code of 1954, as amended. (28 USC § 501 (c)(3)).

The stated objective for organization of the Society is "the increase and diffusion of geographic knowledge." Since 1890, the Society has supported exploration and research projects dedicated to increasing man's knowledge of earth, sea, sky and the universe. The scientific and educational information it obtains is made available to its members and subscribers through its monthly journal, the National Geographic Magazine ("Magazine"), its offerings of maps, atlases, globes, books, and through school bul-

letins, film strips, television programs and research reports.

The Magazine, the official journal of the Society, is furnished only to members of the Society except for subscribing schools, libraries, bookdealers and corporations which represent less than five percent of the total circulation.

Membership in the Society is open to all persons. The majority of such members join the Society because they desire to obtain the Magazine. Applications for membership must be completed and mailed to the Society's headquarters in the Washington, D.C. area. Members presently pay $8.50 a year for membership in the United States, in exchange for which they receive one year's subscription to the Magazine. Members do not become entitled by virtue of their membership status to any other publications or articles of merchandise free of charge (except six month indices); however, they do have the opportunity to purchase items published by the Society from its offices in the Washington, D. C. area.

Non-member subscribers to the Magazine (the schools, libraries, bookdealers and corporations referred to above) must pay $10.00 a year and are primarily restricted to institutions that are not eligible for individual membership in the Society.

As of June, 1972, there were approximately 872,000 member subscribers and 21,000 non-member subscribers in California.

The National Geographic Magazine is exempted from the California Sales and Use Tax as a "periodical" by the California Revenue and Taxation Code § 6362.

The Society announced offerings of maps, atlases, globes and books in the Magazine and by circulars mailed to members and subscribers from outside California. To take advantage of these offerings, an order form enclosed with the mail circulars or an order coupon in the Magazine is removed, completed and mailed to the administrative offices of the Society in the Washington, D.C. area. Deliveries of such publications are then made through the U. S. mail directly from the Society's Washington, D.C. area offices. Payment for the merchandise ordered is either cash with order or by a mailed billing following the purchaser's receipt of the merchandise.

Since 1956, the Society has maintained two offices in California. One such office has been on the 10th floor of the 31-story Russ Building in San Francisco. Until 1965, the other was on the second floor of a two-story building at 8639 Wilshire Boulevard in Beverly Hills. Each office was staffed by a manager and a secretary.[1]

During the period from August 1, 1963 through May 6, 1964, a small number of maps, atlases, globes and books were sold to individuals over the counter from the San Francisco and Los Angeles offices in the amounts of $679.20 and 2,161.85, respectively.[2]

---

[1] In June, 1965, the Los Angeles office was relocated to the eighteenth floor of the 25-story California Savings and Loan Association Building located at 5670 Wilshire Boulevard, Beverly Hills. From July 1967 to June 1972, the Los Angeles office has been staffed by two salesmen and two secretaries. The San Francisco office did not relocate. In October 1968 it added a salesman. A second secretary was added in January, 1970. (It should be noted that these salesmen solicit only advertising copy, which is accepted or rejected in Washington, D. C.).

[2] All local sales were regarded as *de minimus* by the California

The Society paid to the Board state and local sales taxes, plus appropriate penalties and interest, on over the counter sales described above totaling $546.20 during the period April 1, 1964 to May 6, 1964. The Society does not seek refund of these taxes, penalties and interest.

At all times other than during the period from August 1, 1963 to May 6, 1964, no sales were made from the San Francisco and Los Angeles offices of the Society and said offices were again restricted in authority and function to solicitation of advertising copy for the Magazine.

During the period from April 1, 1964 to September 30, 1964, the Society made sales through the U.S. mail of maps, atlases, globes and books to California residents from its Washington, D. C. area offices in the manner described above in the sum of $83,596.48.

Based upon the mail order sales described above, the Society paid under protest a use tax collection liability as follows:

Period	Measure of Tax	State and Local Use Tax Collection Liability With Interest and Penalties
4/1/64-6/30/64	$45,156.36	$2,085.90
7/1/64-9/30/64	38,440.12	1,752.86

All California mail order sales were accepted in the Washington, D. C. area and mailed into California. At no time were the advertising solicitation offices of the Society in California in any way involved in these mail order sales.

Court of Appeal and were disregarded for purposes of its decision by the Supreme Court of California.

The Society sells globes, atlases, books and maps to its members, on orders mailed from all over the world to its headquarters in the Washington, D. C. area. These mail order sales are an important means by which the Society achieves its educational and scientific purposes of increasing man's geographic knowledge of the earth, sea, sky and universe, referred to above.

How The Federal Questions Were Raised And Decided Below

The Society's Claim for Refund filed on September 27, 1966 was based on the grounds that imposition of use tax collection liability on the Society violated due process and constituted an undue burden on interstate commerce, and that the Society was not a "retailer" (as defined in California Taxation and Revenue Code, § 6203).

In its suit in the Superior Court of California, the Society also argued that the imposition of use tax collection liability on its mail-order business was in violation of the Due Process Clause and Commerce Clause of the United States Constitution for the reason that there was insufficient "nexus" between the State of California and the Society to permit the State of California to impose the use tax collection liability on the Society's out-of-state mail-order sales. The Superior Court entered judgment (and an amended judgment) in favor of the Society.

In the appeal to the California Court of Appeal, that court adopted the Society's statement of the question presented as the sole issue to be decided: "The sole question presented in this case is whether [the Society's] activities in the State of California

provided sufficient nexus to support the constitutional imposition of a use tax collection liability measured by [the Society's] gross receipts from its sales of maps, atlases, globes and books from its District of Columbia and Maryland offices to California residents during the period from April 1, 1964 to September 30, 1964."

The court then stated the Board's contentions as follows:

> During the time period for which the Board seeks the use taxes, the Society's sole contacts in California were the maintenance of two small offices in the state, each of which was staffed with a secretary and a salesman whose purpose was to solicit advertising to appear in the Magazine. The Board contends that the maintenance of the two offices for even that limited purpose subjects the Society to payment of use taxes on the mail order sales made outside the state to residents of the state. The Board contends that the imposition of the tax collection does not violate either the due process clause or the commerce clause of the United States Constitution. [footnote omitted]
> App. B, pp. 21a-22a.

The unanimous decision of the appellate court squarely rejected the Board's contentions:

> "However, the question must also be asked whether the Society's in-state activities were connected with the out-of-state sales. No real link may be established between the two. The Society maintained two small offices in California. A function of the Secretary and salesman in each office was to solicit businesses to advertise their merchandise and services in the Magazine. The solicitation of advertisements to appear in the Magazine had no effect upon whether California residents would purchase products of the Society

> which they saw advertised in the Magazine or in mailed circulars.
>
> * * *
>
> "The Society's activities in California are so dissociated from the activities sought to be taxed that there is no justiciable relationship between the two.
>
> "The soliciting in California of advertising for the Magazine does not provide the minimal nexus which is required for this state constitutionally to impose use taxes on the Society's mail order sales to California residents."
> App. B., pp. 26a, 33a.

After the Board's petition for rehearing was denied by the Court of Appeal, the Board filed a Petition for Hearing before the Supreme Court of California.

In its opinion, the Supreme Court of California stated the question before it as follows:

> "Essentially our task is to decide whether the activities of the Society in California constitute a sufficient nexus between this state and the Society so as to justify against constitutional attack the imposition of a use tax collection liability in respect to certain merchandise purchased by California residents by mail orders to the Society's out-of-state offices."
>
> App. A, p. 1a.

In rejecting the opinion of the Court of Appeal, the California Supreme Court formulated a principle it felt applicable to all such cases, and concluded as follows:

> "We are satisfied that from the above cited decisions the following principle can be distilled

and we thus hold: Where an out-of-state seller conducts a substantial mail order business with residents of a state imposing a use tax on such purchasers and the seller's connection with the taxing state is not exclusively by means of the instruments of interstate commerce, the slightest presence within such taxing state independent of any connection through interstate commerce will permit the state constitutionally to impose on the seller the duty of collecting the use tax from such mail order purchasers and the liability for failure to do so.

* * *

"We conclude that the imposition of use tax collection liability on the Society violates neither the due process clause of the Fourteenth Amendment to the United States Constitution nor the Commerce clause of said Constitution."
App. A, pp. 8a, 16a.

THE QUESTIONS ARE SUBSTANTIAL

As construed by California's highest court, the California Revenue and Taxation Code, §§ 6203 and 6204, enables the State of California to impose a use tax collection liability on any out-of-state mail order seller whenever there is the "slightest presence" of the seller in California, regardless of whether that "slight presence" has any connection with the seller's retail mail order activities. This holding by the California Supreme Court is in direct conflict with the decsions of this Court which have established the limits of local taxation of out-of-state, mail order sales. Thus, the California Court's overly broad interpretation of the "nexus" requirement established by this Court (i.e., that there must be "some definite link, some minimum connection, between the state and the * * * transaction it seeks to tax", *Miller Bros.*

Co. v. *Maryland,* 347 U.S. 340, 345) raises serious and far reaching questions as to the scope of the taxing power of any state under both the Due Process Clause of the Fourteenth Amendment and the Commerce Clause (Art. 1 § 8, cl. 3) of the United States Constitution.[3]

The Imposition Of Use Tax Collection Liability Upon An Out-Of-State Organization, Which Has No Retail Outlets Or Retail Sales Solicitors Within The Taxing State And Whose Only Contact With Customers In The State Is Through The United States Mail, Is In Violation Of The Due Process Clause And The Commerce Clause Of The United States Constitution

This Court has never upheld the imposition by a state of use tax collection liability upon a mail order seller which has no retail outlets or retail sales solicitors within the state and whose only connection with *customers* in the State is by the United States mail. *National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753, 758 (1967). There must be "some defi-

---

[3] Due to the "diversities and ambiguities" of the prescribed nexus rules contained in the use tax statutes of the various states, there has long been "unpredictability [as to] the consequences of a given course of conduct from one State to another." *House Comm. on the Judiciary, Report of the Special Subcommittee on State Taxation of Interstate Commerce,* H.R. Rep. No. 565, 89th Cong., 1st Sess. 625-38 (1965). As the Special Subcommittee concluded:

> An overall view of the rules governing the circumstances in which businessmen are required to collect use taxes shows a high degree of agreement among the States in cases where the seller maintains a retail outlet or sales office in the State, or has employees soliciting orders in the State. But where other activities are carried on within the State, or property or facilities maintained there, the jurisdictional consequences vary from one State to another, and often there is no consistent pattern within a particular State. *Id.* at 637.

To permit the test of "slightest presence" as enunciated by the California Supreme Court would merely add to this confusion.

nite link, some minimum connection between a state and the * * * transaction it seeks to tax." *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 344-345 (1954) (emphasis added). Retail sales outlets within the state, *Nelson* v. *Sears Roebuck & Co.,* 312 U.S. 359 (1941), or in-state travelling salesmen, *General Trading Co.* v. *State Tax Commission,* 322 U.S. 335 (1944); *Scripto* v. *Carson,* 362 U.S. 207 (1960), have been held to be a sufficient "nexus" to warrant the imposition of use tax collection liability on an out-of-state seller. The indispensible element in all of these cases is the existence of local, or in-state, *sales* activities. In-state activities of the seller that are not *sales* related are said to be "dissociated" from the out-of-state sales and cannot provide the constitutionally needed nexus for taxing such sales. See *Norton Co.* v. *Department of Revenue,* 340 U.S. 534 (1951); *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965).

Despite the clarity of this Court's decisions, the Supreme Court of California held in the instant case that use tax collection liability may be imposed, pursuant to the California Revenue and Taxation Code §§ 6203 and 6204, on an out-of-state organization which has the *slightest* presence within the state, regardless of the nature of that presence, and which conducts *substantial* mail order sales to residents of California. The California court held that for purposes of this case a presence which was in no way related to the mail order sales satisfied the "minimal nexus" required for imposition of the collection liability. In so holding, the California Court also erroneously concluded that the *substantiality* of a seller's mail order business may be considered in determining whether the imposition of use tax collection liability is constitutional.

A. The existence of two offices in the taxing state, which are part of an activity specifically exempted from tax by the state and which are dissociated from the transaction sought to be taxed, does not provide the minimal nexus required to impose a use tax collection liability on an out-of-state seller's mail order sales

The Supreme Court of California held that the "slightest presence" within the state, without regard to the nature of that presence, permits the state constitutionally to impose on a mail order seller the duty of collecting the use tax from mail order purchasers and the liability for failure to do so. A long line of cases in this Court, however, has held that only where the "presence"of an out-of-state seller manifests itself through retail outlets or in-state retail solicitors for the sale of tangible personalty may the state constitutionally impose such a duty; and a sharp distinction must be drawn between "mail order sellers with *retail* outlets, solicitors or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753, 758 (1967) (emphasis added.) Moreover, if a seller's activities within the state are dissociated from the activity sought to be taxed, then no constitutionally sufficient "nexus" for imposition of the tax exists. See, *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965); *Norton Co.* v. *Department of Revenue,* 340 U.S. 534 (1951).

The California Supreme Court concluded that since the Society maintains an "office" within California —the two offices from which the Society solicits advertising for its tax-exempt magazine—it falls within

California Revenue and Taxation Code, § 6203, and has the duty of collecting use taxes on its mail order sales. The mere existence of an "office" in California does not automatically make imposition of the use tax collection liability constitutional.[4] There must be some connection—"some definite link" in the words of *Miller Bros. Co.* v. *Maryland, supra*—between such an office and the out-of-state sales; in the instant case, that connection is lacking. The California Supreme Court in attempting to show some "slight presence" could point only to the two advertising offices. These two offices which the Society maintains in California are there solely for the purpose of

[4] In *Montgomery Ward and Co., Inc.* v. *State Board of Equalization*, 272 CA2d 723, 78 Cal. Rptr. 373 (Ct. App. 1st Dist. 1969), *cert. den.* 396 U.S. 1040 (1970), the Court struck down the California use tax on certain out-of-state sales by Montgomery Ward and clarified the nature and quality of the constitutionally required nexus between the activity to be taxed and the taxing state. The Court held that due process was violated by the State of California requiring Montgomery Ward to collect use taxes on certain of its Nevada and Oregon sales to California residents, even though Montgomery Ward operated 21 retail stores in California and maintained its regional office in California. The Court states that:

> "California may not burden a foreign corporation's out-of-state business as a condition of permitting it to do business within the state. *The protection afforded and the benefits conferred must have some relationship to the transaction which the State seeks to burden.*" (emphasis supplied)

The fatal defect in the state's case was its failure to show that the intrastate activities contributed to the sales made by the border stores to residents of California. The Court stated *inter alia* that:

> "The existence of a regional headquarters in Oakland, with administrative jurisdiction over the border stores, among others, is not determinative. There is nothing to show any particular contribution to the sales in question here. *Certainly the existence of this headquarters could not give California the right to tax or impose burdens on all sales in all states throughout the region.*" *Montgomery Ward, supra*, at 382-383. (emphasis supplied)

soliciting advertising copy, a non-tangible item, for the Society's Magazine, which is tax-exempt under California law. These offices have never served as retail outlets for any of the tangible merchandise which the Society sells in its mail order activities.[5]

The Supreme Court of California found that both the Society's magazine and the Society's mail order merchandise served the same purpose, i.e., to make information gathered by the Society available to its members. From this the court concluded that both media are *used* by California residents; therefore, the mail orders are a part of the Society's business in California. The court concluded that the Society's California business was merely "departmentalized" and, therefore, under the doctrine of *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359 (1941), the Society was subject to the use tax collection liability.[6]

The holding in *Sears* does not support such a conclusion. In that case, imposition of the use tax was clearly justified and reasonable since the taxpayer was fully exploiting the consumer market through sales of tangible consumer products by local retail establishments. Such a local presence involving solicitation of tangible retail sales provides an appropriate nexus to justify imposition of the use tax when coupled with qualification to do business in the state.

[5] Except for a short period of time, see p. 8, *supra*.

[6] The Court of Appeal properly reached a contrary conclusion, stating:

> • • • The solicitation of advertisements to appear in the Magazine had no effect upon whether California residents would purchase products of the Society which they saw advertised in the Magazine or in mailed circulars. (App. B., p. 26a).

In *Sears,* the in-state activities which supplied the nexus for the use tax were virtually identical to the out-of-state transactions sought to be taxed; the same products were sold to Iowa customers in both the mail order operation and the local retail operation, both being related to the same overall sales effort. In this case there is no similarity between the purchase of advertising space by industrial firms in the Society's exempt magazine (such sales to be consummated in Washington) and its sale of globes, books, maps and atlases by mail order in interstate commerce to California residents. The Society's solicitation of advertising is certainly not a retail function, and the facts of this case bear no resemblance to those in *Sears.*

As noted above, in the *Sears* case, the finding that mail order sales in Iowa were part of Sears' course of business in that state was clearly dependent upon the fact that Sears was qualified to do business in Iowa as a foreign corporation. The Court stated that Sears could not be reached for use tax if it were not qualified to do business in Iowa, because of the impotence of the state power, and recognized that other mail order firms not doing business as foreign corporations in Iowa could not constitutionally be subjected to this use tax.

A primary corporate purpose of the Society is to promote "the increase and diffusion of geographic knowledge." Necessarily, both the magazine and mail order merchandise sold by the Society attempt to accomplish that purpose. The California court's attempt to establish a connection between the magazine advertising solicitation activities of the Society's Cali-

fornia offices and the Society's mail order sales because of this similarity in purpose ignores the separately distinct nature and dissociation of the two activities. An excise tax case, *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965), is more analogous to the instant case than is *Nelson* v. *Sears, Roebuck & Co., supra,* and provides the best guidance in the situation where in-state activities are totally dissociated from out-of-state sales.

In *American Oil,* this Court held that due process was violated by the imposition of an Idaho excise tax on gasoline sold by an oil company where the incidence of the tax fell upon the company, and where the solicitation and acceptance of the sales contract occurred outside Idaho, and the delivery and transfer of title took place outside of that state, even though the company knew the purchaser had arranged for the gasoline to be brought into the state from the place of delivery for storage. The oil company was a licensed dealer and maintained offices in the taxing state of Idaho, but there was no indication that the company's activities in that state contributed in any way to the procurement or performance of the contract. This Court used the following language:

> These cases have also firmly established the doctrine that when a tax is imposed on an out-of-state vendor, 'nexus' between the taxing State and the taxpayer is the outstanding prerequisite of state power to tax. Consistent with this requirement there must be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' Miller Bros. Co. v. Maryland, supra, 347 U.S. at 344-345, 98 L ed at 748. Granted that when a corporation, pursuant to permission given, enters

> a State and proceeds to do local business the 'link' is strong. In such instances there is a strong inference that it exists between the State and transactions which result in economic benefits obtained from a source within the State's territorial limits. The corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances the transactions are said to be 'dissociated from the local business', Norton Co. v. Department of Revenue, supra, 340 U.S. at 537, 95 L ed at 521, [Gross Receipts Tax], and therefore may not, consistent with due process, be taxed. 380 U.S. at 458.

The California Supreme Court attempted to distinguish *American Oil,* on the grounds that in *American Oil,* the seller was not "responsible" for shipping the motor fuel into the State, whereas, in the instant case, the Society was responsible for placing the merchandise into interstate commerce for in-state destination. This is a meaningless distinction: in both cases, the *sales* are wholly out-of-state and are not reachable by an in-state *sales, use or excise* tax. The fact that the Society used an interstate facility to ship merchandise to an in-state purchaser after an out-of-state sale had been completed, changes nothing. The relevant question in both cases is whether there were sufficient in-state activities of the seller to tax the out-of-state sales of that seller. This Court expressly recognized this point as being decisive in *American Oil:*

> "* * * it is plain that neither Utah Oil's position as a licensed dealer in Idaho nor the fact that it otherwise engaged in business there will suffice to uphold the tax. Utah Oil's transfer of gasoline was unquestionably an out-of-state sale

> vis-a-vis Idaho and entirely unconnected with its business in that state."
>
> 380 U.S. at 458.

The Society's mail order business is similarly "dissociated" from the in-state advertising solicitation by its California offices. There is no overall sales effort connecting the in-state and out-of-state activities such as existed in the *Sears* case. Indeed, the Society's California offices engage in absolutely no retail activities which are related to the mail order sales of the Society's merchandise.

The Supreme Court of California also pointed to, but misconstrued, this Court's recent decision in *Standard Steel Co.* v. *Washington Revenue Department,* 419 U.S. 560 (1975), as supportive of its decision in the instant case. In that case the out-of-state seller's contact with the taxing state was the presence therein of one full-time engineer. The engineer, however, worked closely with the in-state customer and advised the customer as to what products it needed from the seller. Although the engineer did not take sales orders himself, by advising the customer as to its needs, he occupied a role little different from the travelling salesmen in *General Trading Co.* v. *Tax Commission,* 322 U.S. 335 (1944), or the local brokers, wholesalers and jobbers in *Scripto* v. *Carson,* 362 U.S. 207 (1960). The personnel in the Society's California offices have no contact of any kind with mail order customers of the Society, for the simple reason that those offices have no retail function related to mail order sales.

As pointed out earlier in footnote 4, *supra,* the holding of the California Supreme Court in the in-

stant case is also in conflict with the California Court of Appeal's decision in *Montgomery Ward & Co.* v. *Board of Equalization,* 272 Cal. App. 2d 728 (1969), *cert. denied,* 396 U.S. 1040 (1970) (in which review was denied by the California Supreme Court and this Court). In the instant case, the California Supreme Court attempted to dismiss the holding in *Montgomery Ward* on the basis of its misreading of the facts therein. In *Montgomery Ward,* there was clear adherence to the principle that the transaction sought to be taxed must bear *some* relation to the in-state activities of a business in order for a state to constitutionally impose a use tax collection liability. This point was ignored by the California Supreme Court in its opinion rendered in the instant case. In truth, the facts of *Montgomery Ward* insofar as the transactions sought to be taxed are concerned are almost a letter copy of *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340 (1954).

B. The "Slightest Presence" test formulated by the California Supreme Court is in conflict with this Court's decision in Miller Bros. Co. v. Maryland

In *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340 (1954), this Court specifically rejected the imposition of use tax collection liability by Maryland on a Delaware seller who was found to have some "presence" within Maryland. The case arose because Maryland seized one of Miller Bros.' trucks which was making deliveries to Maryland residents. The sales in question had been made to Maryland residents who had gone to Miller Bros.' Delaware store. Some of the purchases were carried back to Maryland by the purchasers, some were delivered to the purchasers' Maryland residences by common carrier, and some were delivered to the purchasers' Maryland residences by a Miller Bros. delivery truck. The "presence" in Maryland of Miller Bros. own truck to complete out-of-state sales by delivery was found by this Court to be an insufficient connection between Maryland and Miller Bros. to uphold Maryland's imposition of use tax collection liability.

The "slightest presence" test of the California Supreme Court exceeds the limit set by this Court on permissible state taxation. If allowed to stand, the mere passage through a state by a company official could result in that state taxing an otherwise wholly out-of-state concern on the grounds that the concern, through its company official, was "present" within the state. Or, in the case of the Society, the presence of writers and photographers from the Society within a state could be regarded as "presence" sufficient to tax the Society by that state. Such state action would be clearly contrary to *Miller Bros. Co.* v. *Maryland,* and accordingly, the "slightest presence" test should be set aside by this Court.

C. The substantiality of an out-of-state seller's mail order business within a state attempting to impose use tax collection liability on the seller is of no significance in determining whether imposition of the tax liability is constitutional

Analysis of the opinion of the Supreme Court of California in this case demonstrates that the court placed heavy emphasis and reliance on the substantiality of the Society's mail order activity in concluding that sufficient nexus existed between the Society and the State of California so as to constitutionally justify the imposition of use tax collection

liability. Nowhere in the California Revenue and Taxation Code is it stated that the substantiality of a seller's business is the determining factor as to when use tax liability shall exist; nor do any decisions of this Court indicate that the volume of an out-of-state seller's mail order business is of any constitutional significance.

Nevertheless, the Supreme Court of California makes much of the fact that the Society's mail order activity in California is substantial: "In the instant case, the Society conducts a widespread business with California residents. As of June 1972, it had 872,000 "members" in California who subscribed to its Magazine; additionally it received 21,000 nonmember subscriptions in California. During one nine-month period its mail order sales of maps, atlases, globes and books (exclusive of the Magazine) to California residents amounted to $452,470." The "rule" formulated by the California court incorporates the substantiality of the seller's mail order business as an indicia of "nexus" for imposition of the use tax collection liability: "Where an out-of-state seller conducts a *substantial* mail order business with residents of a state imposing a use tax on such purchasers . . ." (emphasis added).

Yet this Court has rejected the argument that the volume of an out-of-state seller's mail order business provides a constitutionally sufficient nexus for imposition of the tax liability. The dissent in *National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753 (1967), argued that the "large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is sufficient 'nexus' to require Bellas

Hess to collect . . . and to remit the use tax . . ." 386 U.S. at 761-762. The majority clearly rejected this reasoning. To hold that volume of sales alone provides a sufficient "nexus" would be to completely ignore the purpose of the Commerce Clause.

CONCLUSION

In light of the foregoing, we respectfully urge that this Court note probable jurisdiction of the appeal applied for herewith. In furtherance of the noting of jurisdiction, this Court might well wish to follow the route that it took in the recent case of *Diamond National Corporation* v. *State Board of Equalization,* in No. 75-1038, decided April 19, 1976, by directing a Per Curiam reversal of the Supreme Court of Califormnia in this case and a reinstatement of the opinion of the Court of Appeal, First Appellate District.

It may be, however, that this Court will wish to review this case in detail because of the wide-spread effect a complete opinion on same would have in settling this problem in every state in the United States. Should that be the course followed, we would respectfully conclude herewith by stating once again that the State of California has provided no protection or benefits with respect to the Society's out-of-state, mail-order sales. No link can be established between the Society's in-state solicitation of advertising copy and the out-of-state sales, as the solicitation of advertisements had no effect upon whether California residents would purchase products of the Society which they saw announced in the Magazine or in the mailed circulars. The California Court of Appeal correctly held that the constitutionally re-

quired "minimal nexus" was lacking and thus use tax collection liability could not be properly imposed on the Society's mail-order sales to California residents. The decision of the California Supreme Court to the contrary is without basis and should be set aside by this Court and the decision of the Court of Appeal be allowed to stand.

Respectfully submitted,

ARTHUR B. HANSON
FRANK M. NORTHAM
HANSON, O'BRIEN, BIRNEY & BUTLER
888 Seventeenth Street, N.W.
Washington, D. C. 20006

Attorneys for Appellant

Of Counsel:

MICHAEL N. KHOURIE
EUGENE C. CREW
THOMAS PAINE
BROAD, KHOURIE & SCHULZ
One California Street
San Francisco, California 94111

GLENN L. ARCHER, JR.
MICHAEL C. DURNEY
HAMEL, PARK, MCCABE & SAUNDERS
1776 F Street, N.W.
Washington, D.C. 20006

APPENDIX

APPENDIX A

NATIONAL GEOGRAPHIC SOCIETY, *Plaintiff and Respondent,*

v.

STATE BOARD OF EQUALIZATION, *Defendant and Appellant.*

S. F. 23295.

Supreme Court of California,
In Bank.
April 1, 1976.

• • • • • • • • • •

SULLIVAN, *Justice.*

Defendant Board of Equalization of the State of California (Board) appeals from a judgment entered in favor of plaintiff National Geographic Society (Society) ordering that defendant refund certain use taxes to plaintiff. Essentially our task is to decide whether the activities of the Society in California constitute a sufficient nexus between this state and the Society so as to justify against constitutional attack the imposition of a use tax collection liability in respect to certain merchandise purchased by California residents by mail orders to the Society's out-of-state offices.

The case was tried by the court, sitting without a jury, and upon a written stipulation of facts. In words and substance the pertinent facts are as follows. The Society is a nonprofit scientific and educational organization incorporated in 1888 under the laws of the District of Columbia with its administrative offices located in Washington, D.C. It is exempted from the payment of federal income taxes.[1] The stated objective of the Society is "the increase and

---

[1] Under 26 United States Code section 501(c)(3), as amended. (Internal Rev.Code.)

diffusion of geographic knowledge." It supports exploration and research projects dedicated to increasing man's knowledge of the earth, sea, sky and universe. The scientific and educational information obtained is made available to the members and subscribers through the National Geographic Magazine (hereinafter the "Magazine") and offerings of maps, atlases, globes, books, school bulletins, television programs and research reports.

The Magazine, the official journal of the Society, is furnished only to members of the Society except for subscribing schools, libraries, book dealers and corporations.[2] Membership is open to all persons; the majority of members join in order to obtain the Magazine. They pay $7.50 a year for membership for which they receive one year's subscription to the Magazine.[3] As of June 1972 there were approximately 872,000 member subscriptions and 21,000 nonmember subscriptions in California. The Magazine is exempted from California sales and use taxes as a "periodical" under Revenue and Taxation Code section 6362.[4]

The Society advertised offerings of maps, atlases, globes and books in the Magazine and by announcements mailed to members and subscribers during all periods relevant hereto. To take advantage of these offerings, an order form enclosed with the mail announcements or an order coupon in the Magazine is removed, completed and mailed to the administrative offices of the Society in Washington, D.C. Deliveries of such publications are made through the mail either directly from the Society's Washington and/or Maryland offices. Payment for the merchandise ordered is either cash with order or by a mailed billing following the

---

[2] These represent less than 5 percent of total circulation.

[3] Nonmember subscribers such as schools, libraries, bookdealers and corporations pay $9 a year.

[4] Hereafter, unless otherwise indicated, all section references are to the Revenue and Taxation Code.

purchaser's receipt of the merchandise. Finally, a small volume of merchandise is sold directly over the counter in the Washington, D.C. offices. Although these offerings of maps, atlases, globes and books are made only in the Magazine and in mail announcements, anyone who removes an order coupon from the Magazine may order and receive such merchandise.

Since 1956, the Society has maintained two offices in California—one in San Francisco and one in Los Angeles. During the tax periods in controversy there were two employees in each office; later, there were four in each office. During the period from August 1, 1963, through May 6, 1964, these two offices sold maps, atlases, globes and books, of the type described above as mail order merchandise, over the counter to any individual requesting them.[5] At all other times, these offices made no sales and confined their activities to the solicitation of advertising for the Magazine.

During the period from April 1, 1964, to September 30, 1964, the Society made sales of maps, atlases, globes and books to California residents in the sum of $85,596.48 through mail orders. The Board notified the Society that it was obligated, under section 6203, to collect the use taxes on this merchandise and that since it had not done so, it was liable for an equivalent amount under section 6204. The Society paid the assessment for the above two quarters of 1964 under protest and brought this action for a refund. The total state and local use tax collection liability with interest and penalties was the sum of $3,838.76.[6]

---

[5] The over-the-counter sales had a total value of $2,841.05. The value of the merchandise sold to California residents by mail order during the same period was $452,470. The Society paid state and local sales taxes, plus penalties and interest upon sales totalling $546.20 during the period April 1, 1964, to May 6, 1964. It seeks no refund of this amount.

[6] Although it is not in the stipulated facts, documents in the record and the briefs on appeal reveal that the total asserted tax

[1] The use tax is a natural companion to the sales tax since it is complementary to the latter. (*Miller Bros. Co.* v. *Maryland* (1954) 347 U.S. 340, 343, 74 S.Ct. 535, 98 L.Ed. 744; *Nelson* v. *Sears, Roebuck & Co.* (1940) 312 U.S. 359, 361, 61 S.St. 586, 85 L.Ed. 888; *Chicago Bridge & Iron Co.* v. *Johnson* (1941) 19 Cal.2d 162, 165-166, 119 P.2d. 945, quoting from *Southern Pacific Company* v. *Gallagher* (1938) 306 U.S. 167, 171, 59 S.Ct. 389, 83 L.Ed. 586.) "The use tax . . . usually appears as a support to the sales tax in two respects. One is protection of the state's revenues by taking away from inhabitants the advantages of resort to untaxed out-of-state purchases. The other is protection of local merchants against out-of-state competition from those who may be enabled by lower tax burdens to offer lower prices." (*Miller Bros. Co.* v. *Maryland, supra,* 347 U.S. at p. 343, 74 S.Ct. at p. 538). It is well settled that a state may constitutionally impose directly upon resident purchasers a tax for the privilege of using goods within the state. "The validity of such a tax, so far as the purchaser is concerned, 'has been withdrawn from the arena of debate.' . . ." (*Nelson* v. *Sears, Roebuck & Co., supra,* 312 U.S. 359, 363, 61 S.Ct. 586, 588, 85 L.Ed. 888). The constitutionality of California's exaction of the tax has been clearly upheld. (*Union Oil Co.* v. *State Bd. of Equal.* (1963) 60 Cal.2d 441, 457-459, 34 Cal.Rptr. 872, 386 P.2d 496, appeal dismissed 377 U.S. 404, 84 S.Ct. 1629, 12 L.Ed.2d 495).

However, the collection of the use tax directly from each resident purchaser has presented a difficult, if not insuperable, administrative problem for the taxing state. As a consequence, many states have sought to impose upon an out-of-state seller liability to collect a local use tax (see *Nat. Bellas Hess* v. *Dept. of Revenue* (1966) 386 U.S. 753, 757, 87 S.Ct. 1389, 18 L.Ed.2d 505). California has met the problem in the same way. The use tax in this state is an excise tax "on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer . . . for storage, use, or other consumption in this state. . . ." (§ 6201.) "Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State . . . ." (§ 6202.) Section 6203 requires "every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state" to collect the tax from the purchaser. A "retailer engaged in business in this state" is defined in section 6203 and includes "[a]ny retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business." Section 6204 provides that the tax required to be collected by the retailer constitutes a debt owed by the retailer to the state.

It is the position of the Board that since the Society maintains an "office" or "other place of business" within California—namely its two offices from which it solicits advertising for the Magazine—it falls within section 6203 and has the duty of collecting use taxes on goods sold through mail orders to California residents. It is the position of the Society, on the other hand, that the imposition of a use tax collection liability under such circumstances is in violation of the due process clause of the Fourteenth Amendment to, and of the commerce clause (art. I, § 8, cl. 3) of, the United States Constitution.

---

liability exceeds $180,000 and covers a period of nine years. The Board agreed to postpone collection of the remainder until this action determined the constitutionality of the asserted liability.

The Society paid the taxes for the two consecutive quarters covering April 1, 1964, to June 30, 1964, and July 1, 1964, to September 30, 1964. These periods were chosen to represent the two different degrees of in-state activity (i.e. with and without the over-the-counter sales of the mail order merchandise.) Since we hold that the collection liability may be imposed without *any* over-the-counter sales, we do not consider these sales further.

The criteria for determining the validity of such liability in the light of the above two-pronged constitutional attack were set forth in *Nat. Bellas Hess* v. *Dept. of Revenue, supra,* 386 U.S. 753, 756-57, 87 S.Ct. 1389, 1391, 18 L.Ed.2d 505: "These two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. See *Central R. Co.* v. *Pennsylvania,* 370 U.S. 607, 621-622, 82 S.Ct. 1297, 1306-1307, 8 L.Ed.2d 720 (concurring opinion of MR. JUSTICE BLACK). As to the former, the Court has held that 'State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' *Freeman* v. *Hewit,* 329 U.S. 249, 253, 67 S.Ct. 274, 277, 91 L.Ed. 265. See also *Central Greyhound Lines* v. *Mealey,* 334 U.S. 653, 663, 68 S.Ct. 1260, 1266, 92 L.Ed. 1633; *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 462, 79 S.Ct. 357, 364, 3 L.Ed.2d 421. And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the State has given anything for which it can ask return.' *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267. See also *Standard Oil Co.* v. *Peck,* 342 U.S. 382, 72 S.Ct. 309, 96 L.Ed. 427; *Ott* v. *Mississippi Val. Barge Line,* 336 U.S. 169, 174, 69 S.Ct. 432, 434, 93 L.Ed. 585. The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 344-345, 74 S.Ct. 535, 539, 98 L.Ed. 744; *Scripto, Inc.* v. *Carson,* 362 U.S. 207-210-211, 80 S.Ct. 619, 621-622, 4 L.Ed.2d 660 [Fn. omitted.]

See also *American Oil Co.* v. *Neill,* 380 U.S. 451, 458, 85 S.Ct. 1130, 1134, 14 L.Ed.2d 1." More recently in a case involving a business and occupation tax levied on the unapportioned gross receipts from sales, the high court again quoting the same language from *Wisconsin* v. *J. C. Penney Co.* (1940) 311 U.S. 435, 444, 61 S.Ct. 246, 85 L.Ed. 267, pointedly declared that "the question is 'whether the state has given anything for which it can ask return.' " (*Standard Steel Co.* v. *Wash. Revenue Dept.* (1974) 419 U.S. 560, 562, 95 S.Ct. 706, 708, 42 L.Ed.2d 719.)

It is clear that where the out-of-state mail order seller's connection with the taxing state is *solely* by instruments of interstate commerce—e.g., by common carrier or the United States mail—the state has given nothing for which it can ask return. Indeed in *Nat. Bellas Hess,* the Supreme Court took pains to point out that it "has never held that a State may impose the duty of use tax collection and payment" under such circumstances. (386 U.S. at p. 758, 87 S.Ct. at p. 1392.) Accordingly it held that Illinois could not constitutionally impose a use tax collection liability upon a mail order house whose principal place of business was in Missouri and whose only contacts with Illinois were by United States mail or common carrier since in the circumstances of that case it would amount to a tax on the privilege of doing interstate business and would be violative of the commerce clause.

Where, on the other hand, the out-of-state mail order seller, although effecting its sales through instruments of interstate commerce, has retail outlets in the taxing state albeit the mail orders were neither solicited nor placed by any of its agents therein (*Nelson* v. *Sears, Roebuck & Co., supra,* 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888), or has local retail outlets and in addition has solicited the mail order sales through local advertisement but not by local agents (*Nelson* v. *Montgomery Ward* (1941) 312 U.S. 373, 61 S.Ct. 593, 5 L.Ed. 897) or, having no local office or place

of business, nevertheless has solicited the mail order sales by its travelling salesmen sent into the taxing state (*General Trading Co.* v. *Tax Comm'n* (1944) 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309) or has solicited them only through local brokers, wholesalers or jobbers compensated on a commission basis (*Scripto* v. *Carson* (1960) 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660), the use tax collection liability has been upheld. On this crucial issue of jurisdiction to tax, we think the most recent ruling in the *Standard Steel* case, although involving a business and occupation tax, is not only germane but highly significant. There the court declared that it "verges on the frivolous" to contend that the state had not given anything for which it could ask return where the only connection of the out-of-state seller with the taxing state, other than through instruments of interstate commerce, was the presence therein of one full time engineer who advised the seller's purchaser with regard to its needs for a certain product ordered directly by mail to the seller and shipped directly to the purchaser by common carrier. (*Standard Steel Co.* v. *Wash. Revenue Dept., supra,* 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719.)

[2] We are satisfied that from the above cited decisions the following principle can be distilled and we thus hold: Where an out-of-state seller conducts a substantial mail order business with residents of a state imposing a use tax on such purchasers and the seller's connection with the taxing state is *not* exclusively by means of the instruments of interstate commerce, the slightest presence within such taxing state independent of any connection through interstate commerce will permit the state constitutionally to impose on the seller the duty of collecting the use tax from such mail order purchasers and the liability for failure to do so.

[3] In the instant case, the Society conducts a widespread business with California residents. As of June

1972, it had 872,000 "members" in California who subscribed to its Magazine; additionally it received 21,000 nonmember subscriptions in California. During one nine-month period its mail order sales of maps, atlases, globes and books (exclusive of the Magazine) to California residents amounted to $452,470. There can be no question as to the Society's presence in California independent of any connection with this state through interstate commerce. It maintained in this state two offices from which employees solicited advertising for the Magazine; clearly these offices provided sufficient activities within California, receiving from this state protection and benefits "for which it can ask return." (*Wisconsin* v. *J. C. Penney Co., supra,* 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267.) Indeed the Society concedes that it has never been its position in this case that the tax did not apply because of the insubstantiality of the Society's activities in California. In light of the cases and principle set forth above, California had the jurisdiction to impose on the Society a use tax collection liability in respect to its mail order sales to California residents of the articles referred to.

[4] It is this conclusion which is the target of the Society's constitutional attack. The Society contends that its activities in California are so "dissociated" from the mail order activities sought to be taxed that there is "no justiciable relationship between the two." These in-state activities—namely the solicitation of advertising for the Magazine—bear no relation whatsoever to the mail order sales of goods; the solicitation of advertisements neither informs the subscribers of the goods in question nor induces them to purchase the goods.[7]

---

[7] The Society also contends that the in-state activities of the Magazine cannot be used to determine whether there is a nexus sufficient to allow the imposition of the collection obligation. This argument is based upon misinterpretation of the tax exemption for periodicals, such as the Magazine provided in section 6362 of the Revenue and Taxation Code.

Our attention has not been directed to, nor have we found, any controlling appellate decision holding in circumstances reasonably approximating those of the case at bench that the imposition of a use tax collection liability on a mail order seller is constitutionally impermissible under the due process clause or the commerce clause of the United States Constitution because the in-state activities of such seller are "dissociated" from its mail order activities. Such a thesis, we think, would cut across the doctrinal principles running through the fabric of authorities discussed in the first part of this opinion. More particularly, it must collapse under the rationale and holding of *Nelson* v. *Sears, Roebuck & Co., supra,* 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888.

In *Sears, Roebuck,* the taxpayer, a New York corporation, had retail stores in Iowa and in addition conducted a mail order business directly between customers in Iowa and the taxpayer's mail order houses located outside Iowa. Sears, Roebuck contended, and the Iowa Supreme Court held, that these mail order sales were "separate and distinct" from the taxpayer's activities in Iowa. The state court concluded that although the use tax was on the purchaser nevertheless since it had to be collected when the sale was made and the property was outside the state, Iowa lacked the power to regulate such activities and its imposi-

---

The existence of a nexus to tax an interstate transaction is a constitutional question. The only relevant considerations are the contacts between the taxing state and the person and event to be taxed. The fact that a state chooses not to tax when it could constitutionally do so does not in any way reduce these contacts with the state. The manner in which the state chooses to exercise the power does not affect the existence of the power.

Section 6362 exempts periodicals and and tangible personal property which becomes an ingredient or component part of a periodical. The statute does not in any way exempt the presence of the Society in the state when it is related to the Magazine. The statute cannot be construed to prevent the tax obligation the state seeks to impose here.

tion of use tax collection liability was unconstitutional. The Supreme Court rejected this argument of "dissociation" and reversing, upheld the use tax collection liability as constitutional. We quote somewhat at length from the opinion of Mr. Justice Douglas for the court because it at once resolves the central constitutional argument before us and answers the cluster of arguments presented by the Society to support its claim of dissociation: "The fact that under Iowa law the sale is made outside of the state does not mean that the power of Iowa 'has nothing on which to operate.' *Wisconsin* v. *J. C. Penney Co., supra,* [311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267]. The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, so far as the purchaser is concerned, 'has been withdrawn from the arena of debate.' *Henneford* v. *Silas Mason Co.,* 300 U.S. 577, 583, 57 S.Ct. 524, 527, 81 L.Ed. 814; *Southern Pacific Co.* v. *Gallagher, supra,* [306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586]. It is one of the well-known functions of the integrated use and sales tax to remove the buyers' temptation 'to place their orders in other states in the effort to escape payment of the tax on local sales.' *Henneford* v. *Silas Mason Co., supra,* 300 U.S. p. 581, 57 S.Ct. at p. 526, 81 L.Ed. 814. As pointed out in that case (300 U.S. p. 582, 57 S.Ct. at p. 526, 81 L.Ed. 814), the fact that the buyer employs agencies of interstate commerce in order to effectuate his purchase is not material, since the tax is 'upon the privilege of use after commerce is at an end.' . . .

"So the nub of the present controversy centers on the use of respondent as the collection agent for Iowa. The imposition of such a duty, however, was held not to be an unconstitutional burden on a foreign corporation in *Monamotor Oil Co.* v. *Johnson,* 292 U.S. 86, 54 S.Ct. 575, 78 L.Ed. 1141, and *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488. But respondent insists that those cases involved local activity by the foreign corporation as a result of which property was sold to its local customers, while in the instant case there is no local activ-

ity by respondent which generates or which relates to the mail orders here involved. Yet these orders are still a part of respondent's Iowa business. The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would merely be a result of the 'impotence of state power.' *Wisconsin* v. *J. C. Penney Co., supra.* Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business. Cf. *Wisconsin* v. *J. C. Penney Co., supra.* Respondent cannot avoid that burden though its business is departmentalized. Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts." (*Sears, Roebuck, supra,* at pp. 363, 364, 61 S.Ct. at p. 588.)

Like Sears, Roebuck in the cited case, the Society in the instant one is a single business entity conducting its course of business in California. Here, as there, its mail orders are part of its California business. We observe no basic dissimilarity between the Magazine on the one hand and the maps, atlases, globes and books on the other. Both the Magazine and the latter mail order merchandise are ordered, paid for and delivered in essentially the same way. The Magazine and the merchandise are remarkably similar in nature, function and purpose. We can discern no significant difference between a periodical which deals with geography and maps, atlases, globes and books which obviously cover the same field of knowledge. Nor can we detect any fundamental difference in function—both the Magazine and the merchandise make information gathered by the Society available to its members. Overall and common to both is the pervasive purpose of the Society to further

"the increase and diffusion of geographic knowledge." The final result of the Society's course of business is the *use* by California's residents of all of the above media of knowledge. In short, the mail orders are a part of the Society's business in California. As in *Sears, Roebuck,* the Society cannot avoid its use tax collection liability by claiming that its California business is departmentalized. We reject as of no constitutional relevance its claim that its in-state activities are "dissociated" from its mail order activities.

The Society insists that authoritative support for its claim of dissociation can be found in *American Oil Co.* v. *Neill* (1964) 380 U.S. 451, 85 S.Ct. 1130, 14 L.Ed.2d 1, and *Montgomery Ward & Co.* v. *State Board of Equalization* (1969) 272 Cal.App.2d 728, 78 Cal.Rptr. 373. We disagree. The Society misconstrues the holding of these cases—neither asserts a "dissociation" between the nature of the in-state activities and the nature of the activities of the business entity sought to be taxed, but rather each holds that there is a defect in the relationship between the state and the event to be taxed.

In *American Oil* American's predecessor in interest, Utah Oil Refining Company, was a Delaware corporation authorized to do business in Idaho. That state imposed an excise tax on all motor fuels received in the state, taxing the dealer as the person first receiving the fuels and also holding him liable as a constructive recipient of fuels sold by him outside the state for in-state use by an unlicensed purchaser. Upon acceptance of bids transmitted from its office in Salt Lake City, Utah Oil sold gasoline to the Atomic Energy Commission (A.E.C.) for delivery in Utah at a designated price f. o. b. Salt Lake City. The A.E.C. then transported the fuel by common carrier, selected and paid by A.E.C., to Idaho where it was stored in A.E.C.-owned tanks. Utah Oil sold the gasoline, knowing it would be imported into and used in Idaho.

The Supreme Court held that Idaho's imposition of the excise tax could not be upheld as against attack under the due process clause: "In the present case it is plain that neither Utah Oil's position as a licensed dealer in Idaho nor the fact that it otherwise engaged in business there will suffice to uphold the tax. Utah Oil's transfer of gasoline was unquestionably an out-of-state sale vis-a-vis Idaho and entirely unconnected with its business in that State. *Each and every phase of the transaction had its locus outside of Idaho: . . .*" (*American Oil Co.* v. *Neill, supra,* 380 U.S. at p. 458, 85 S.Ct. at p. 1135; italics added.) The essence of the holding is that the taxed event was the sale of gasoline in Utah and neither (1) Utah Oil's knowledge that the A.E.C. would later import the gasoline into Idaho nor (2) Utah Oil's being licensed as a dealer there was sufficient to bring the transaction within the taxing power of Idaho. As the italicized language, *supra,* makes clear, the sale was beyond the taxing power of Idaho because Utah Oil had nothing to do with the interstate transportation of the gasoline into that state.

This situation is distinguishable from the one at bench where the Society *was* entirely responsible for shipping the mail order merchandise into California for use there by the purchasers, the mail orders being part of the Society's course of business in this state. (*Nelson* v. *Sears, Roebuck & Co., supra,* 312 U.S. 359, 364, 61 S.Ct. 586, 85 L.Ed. 888). *American Oil* is not authority, as the Society would have it, for a "dissociation" between its in-state activities and its mail order activities in a use tax context. The Society ingeniously attempts to make the concept of "dissociation" employed in sales tax gross receipts tax cases (see for example, *Norton* v. *Dept. of Revenue* (1951) 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed. 517) spill over into the use tax field. As the high court made clear in *Norton,* the impact of the use tax "is on the local buyer or user. Cases involving them are not controlling here, for this tax falls on the vendor." (*Id.,* at p. 537, 71 S.Ct. at p. 380, citing inter alia

Nelson v. *Sears, Roebuck & Co., supra,* 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888, and *Nelson* v. *Montgomery Ward, supra,* 312 U.S. 373, 61 S.Ct. 593, 85 L.Ed. 897.)

Nor does *Montgomery Ward & Co.* v. *Board of Equalization, supra,* 272 Cal.App.2d 728, 78 Cal.Rptr. 373, assist the Society. There the Board attempted to impose a *use* tax collection liability on Montgomery Ward for over-the-counter sales made for cash or credit to California residents at its stores in Oregon and Nevada. In support of the liability, the Board relied on (1) a nexus between the state and the taxpayer by reason of the latter's retail stores in California and (2) the taxpayer's knowledge that the goods would be used in California by reason of the customer's address on his charge account. The use tax collection liability was struck down as violative of the due process, equal protection and commerce clauses of the United States Constitution.

It is noteworthy that the decision did not rest on a lack of nexus between the state and the taxpayer. The presence of retail outlets in California would clearly provide a basis for use tax collection liability in respect to merchandise delivered or mailed directly into California. (*Nelson* v. *Montgomery Ward, supra,* 312 U.S. 373, 61 S.Ct. 593, 85 L.Ed. 897.) The constitutional defect lay in the lack of certainty of the connection between the seller's activities and the event to be taxed, namely the use. In *Nelson* the certainty of use in the taxing state was guaranteed by the seller's own actions, namely mailing the goods directly to the purchaser. However, unless the seller by his own actions makes certain the taxable use, e. g. by sending or delivering the merchandise into the taxing state, he cannot be required to collect the tax.

In *Miller Bros.* v. *Maryland, supra,* 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744, Maryland likewise tried to impose a use tax collection liability on out-of-state over-the-counter sales in Delaware. There the out-of-state seller had no in-state

retail stores so that a constitutional problem was presented as to substantiality of contacts between Maryland and the Delaware business entity. The court in denying tax liability noted that no one was liable for a use tax until the merchandise was imported into the taxing state. When there is an over-the-counter out-of-state sale, the taxable event, use occurs only after the sale is complete; the seller has no control over that use. When discussing *Miller Bros.* in *Scripto* v. *Carson, supra,* 362 U.S. 207, 212, 80 S.Ct. 619, 4 L.Ed.2d 660, the Supreme Court declared that "it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland." The use in the taxing state must be certain from the retailer's own actions and not just known to him from other factors. Knowledge is an insufficient connection to uphold a tax against attack under the due process clause. (*American Oil Co.* v. *Neill, supra,* 380 U.S. 451, 457, 85 S.Ct. 1130, 14 L.Ed.2d 1.)

The same result was reached on the same facts by the court in *Montgomery Ward & Co.* v. *Board of Equalization, supra,* 272 Cal.App.2d 728, 78 Cal.Rptr. 373: The out-of-state over-the-counter sales for cash or credit cannot support the imposition of a use tax collection obligation on the out-of-state seller on all goods ultimately used in California. In the case at bench, therefore, since the Society sends all its merchandise directly to the resident purchasers in California, *Montgomery Ward* is inapposite.

We conclude that the imposition of use tax collection liability on the Society violates neither the due process clause of the Fourteenth Amendment to the United States Constitution nor the commerce clause of said Constitution.

The judgment is reversed and the cause is remanded to the trial court with directions to enter judgment for defendant Board of Equalization.

WRIGHT, C. J., and MCCOMB, TOBRINER, MOSK, CLARK and RICHARDSON, JJ., *concur.*

APPENDIX B

NATIONAL GEOGRAPHIC SOCIETY, *Plaintiff and Respondent,*

v.

BOARD OF EQUALIZATION of the State of California, *Defendant and Appellant.*

Civ. 35629.
Court of Appeal, First District, Division 2.
March 26, 1975.

Hearing Granted June 4, 1975.

• • • • • • • • • •

BRAY, Associate Justice.•

Defendant Board of Equalization of the State of California (hereinafter "Board") appeals from the judgment of the San Francisco Superior Court in favor of plaintiff National Geographic Society (hereinafter "Society").

Issue Presented:

Plaintiff's in-state activities do not provide sufficient nexus to make it liable for use taxes on materials purchased by California residents through mail orders to plaintiff's out-of-state office.

Record:

Plaintiff filed a complaint against defendant for refund of certain use taxes paid under protest. After trial before the court, without a jury, upon a stipulation of facts the court filed an amended judgment[1] ordering defendant to refund to plaintiff $3,864.33 together with interest. Defendant appeals.

---

[1] The court first filed a judgment and then an amended judgment. As the amended judgment superseded the original judgment we consider herein only the amended judgment.

Stipulated Facts:

The National Geographic Society is a nonprofit scientific and educational organization incorporated in 1888 under the laws of the District of Columbia with its administrative offices located at 17th and M Streets, N.W., Washington, D.C.

The Society is exempted as an organization from the payment of federal income taxes under Internal Revenue Code, section 501, subdivision (c), subsection (3) as amended.

The stated objective for organization of the Society is "the increase and diffusion of geographic knowledge." Since 1890, the Society has supported exploration and research projects dedicated to increasing man's knowledge of earth, sea, sky and the universe. The scientific and educational information it obtains is made available to its members and subscribers through its monthly National Geographic Magazine (hereinafter "the Magazine"), its offerings of maps, atlases, globes, books and through school bulletins, television programs and research reports.

The Magazine, the official journal of the Society, is furnished only to members of the Society except for subscribing schools, libraries, bookdealers and corporations which represent less than 5 percent of total circulation.

Membership in the Society is open to all persons. The majority of such members joined the Society because they desired to obtain the Magazine. Applications for membership must be completed and mailed to the Society's headquarters in the Washington area. Members presently pay $7.50 a year for membership in exchange for which they receive one year's subscription to the Magazine. Members do not become entitled by virtue of their membership status to any other publications or articles of merchandise free of charge (except six month indexes); however, they

do have the opportunity to purchase items published by the Society from its offices in Washington, D.C.

Nonmember subscribers to the Magazine (the schools, libraries, bookdealers and corporations referred to above) must pay $9.00 a year and are primarily restricted to institutions that are not eligible for individual membership in the Society.

As of June 1972, there were approximately 872,000 member subscriptions and 21,000 nonmember subscriptions to the Magazine in California.

[1] The Magazine is exempted from California sales and use taxes as a "periodical" under Revenue and Taxation Code section 6362.

The Society advertised offerings of maps, atlases, globes and books in the Magazine and by announcements mailed to members and subscribers during all periods relevant hereto. To take advantage of these offerings, an order form enclosed with the mail announcements or an order coupon in the Magazine is removed, completed and mailed to the administrative offices of the Society in Washington, D. C. Deliveries of such publications are made through the mail either directly from the Society's Washington and/or Maryland offices. Payment for the merchandise ordered is either cash with order or by a mailed billing following the purchaser's receipt of the merchandise. Finally, a small volume of merchandise is sold directly over the counter in the Washington, D. C. offices.

Although these offerings of maps, atlases, globes and books are made only in the Magazine and in mail announcements, anyone who removes an order coupon from the Magazine may order and receive such merchandise.

Since 1956, the Society has maintained two offices in California. One such office has been on the 10th floor of the 31-story Russ Building in San Francisco. Until 1965,

the other was on the second floor of a two-story building at 8639 Wilshire Boulevard in Beverly Hills. Each office was staffed by a manager and a secretary.

During the period from August 1, 1963 through May 6, 1964, maps, atlases, globes and books of the type described above were sold to individuals over the counter from the San Francisco and Los Angeles offices of the Society totalling a sales' value as follows:

San Francisco	Los Angeles
$679.20	$2,161.85

In comparison with local sales as tabulated in the foregoing schedule, the shipment of maps, atlases, globes and books exclusive of the Magazine to California Society members and residents from orders received at the Washington, D. C. office during the same period totalled a sales' value of $452,470.00.

With regard to the sales of maps, atlases, globes and books from the San Francisco and Los Angeles offices of the Society as described above, the offices did not verify whether or not a prospective purchaser was a member of the Society and sales could have been made to individuals who were neither members nor subscribers.

The Society paid to the Board state and local taxes plus appropriate penalties and interest upon sales totalling $546.20 described above, during the period April 1, 1964 to May 6, 1964. The Society does not seek refund of these taxes, penalties and interest.

At all times other than during the period from August 1, 1963 to May 6, 1964, no sales were made from the San Francisco and Los Angeles offices of the Society and said offices were again restricted in authority and function to solicitation of advertising for the Magazine.

During the period from April 1, 1964 to September 30, 1964 the Society made sales of maps, atlases, globes and

books to California residents from its Washington, D. C. offices in the manner described above in the sum of $83,596.48.

Based upon the sales described above, the Society paid under protest a use tax collection liability as follows:

Period	Measure of Tax	State and Local Use Tax Collection Liability with Interests and Penalties
4/1/64—6/30/64	$45,156.36	$2,085.90
7/1/64—9/30/64	38,440.12	1,752.86
	$83,596.48	$3,838.76

Plaintiff is not liable for the use taxes.

As stated in appellant's opening brief: "The sole question presented in this case is whether respondent's activities in the State of California provided sufficient nexus to support the constitutional imposition of a use tax collection liability measured by respondent's gross receipts from its sales of maps, atlases, globes and books from its District of Columbia and Maryland offices to California residents during the period from April 1, 1964 to September 30, 1964."

During the time period for which the Board seeks the use taxes, the Society's sole contacts in California were the maintenance of two small offices in the state, each of which was staffed with a secretary and a salesman whose purpose was to solicit advertising to appear in the Magazine. The Board contends that the maintenance of the two offices for even that limited purpose subjects the Society to payment of use taxes on the mail order sales made outside the state to residents of the state.[2] The Board

[2] The section involved is Revenue and Taxation Code section 6203: "Except as provided by Sections 6292 and 6293 every re-

contends that the imposition of the tax collection does not violate either the due process clause or the commerce clause of the United States Constitution.

[2] Basically the California use tax statute seeks to make out-of-state sellers collect use taxes on items sold to California residents for use, storage or consumption in this state. It is the consumer who is taxed, but the retailer is liable for an amount equivalent to the tax due to his statutorily imposed duty to collect the tax. (Rev. & Tax. Code § 6203; Montgomery Ward & Co. v. State Bd. of Equalization (1969) 272 Cal.App.2d 728, 742-743, 78 Cal. Rptr. 373; cert. den. 396 U.S. 1040, 90 S.Ct. 688, 24 L.Ed.2d 684.)

One of the most recent Supreme Court cases on the question of whether imposition of a use tax liability violates the due process clause and the commerce clause states: "These

---

tailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapters 3.5 or 4 of this part, shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board. [¶] As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease. [¶] 'Retailer engaged in business in this state' as used in this and the preceding section means and includes any of the following: [¶] (a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business. [¶] (b) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property. [¶] (c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state."

two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. See Central R. Co. of Pa. v. Commonwealth of Pennsylvania, 370 U.S. 607, 621-622, 82 S.Ct. 1297, 1306-1307, 8 L.Ed.2d 720 (concurring opinion of Mr. Justice Black). As to the former, the Court has held that 'State taxation falling on interstate commerce • • • can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' Freeman v. Hewit, 329 U.S. 249, 253, 67 S.Ct. 274, 277, 91 L.Ed. 265. See also Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 663, 68 S.Ct. 1260, 1266, 92 L.Ed. 1633; Northwestern States Portland Cement Co. v. State of Minnesota, 358 U.S. 450, 462, 79 S.Ct. 357, 364, 3 L.Ed.2d 421. And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the state has given anything for which it can ask return.' Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267. See also Standard Oil Co. v. Peck, 342 U.S. 382, 72 S.Ct. 309, 96 L.Ed. 427; Ott v. Mississippi Val. Barge Line Co., 336 U.S. 169, 174, 69 S.Ct. 432, 434, 93 L.Ed. 585. The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' Miller Bros. Co. v. State of Maryland, 347 U.S. 340, 344-345, 74 S.Ct. 535, 539, 98 L.Ed. 744; Scripto, Inc. v. Carson, 362 U.S. 207, 210-211, 80 S.Ct. 619, 621-622, 4 L.Ed2d 60. See also American Oil Co. v. Neill, 380 U.S. 451, 458, 85 S.Ct. 1130, 1134, 14 L.Ed.2d 1." (Nat. Bellas Hess v. Dept. of Revenue (1967) 386 U.S. 753, 756-757, 87 S.Ct. 1389, 1391, 18 L.Ed. 2d 505.)

The concept of some nexus, some minimum connection between the state and the person, property or transaction it seeks to tax is reiterated again and again in the cases. In American Oil Co. v. Neill (1965) 380 U.S. 451, 85 S.Ct. 1130, 14 L.Ed.2d 1, the court restated this concept, but stated that even where a corporation has *some* in-state contacts, the corporation could exempt itself from use tax liability by a showing that no connection in reality existed between the in-state activities and the out-of-state sales. "These cases have also firmly established the doctrine that when a tax is imposed on an out-of-state vendor, 'nexus' between the taxing State and the taxpayer is the outstanding prerequisite on state power to tax. Consistent with this requirement there must be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' Miller Bros. Co. v. State of Maryland, *supra,* 347 U.S. at 344-345, 74 S.Ct. [535] at 539. Granted that when a corporation, pursuant to permission given, enters a State and proceeds to do local business the 'link' is strong. In such instances there is a strong inference that it exists between the State and transactions which result in economic benefits obtained from a source within the State's territorial limits. The corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances, the transactions are said to be 'dissociated from the local business,' Norton Co. v. Department of Revenue, *supra,* 340 U.S. [534] at 537, 71 S.Ct. [377] at 380, [95 L.Ed. 517], and therefore may not, consistent with due process, be taxed." (American Oil Co. v. Neill, *supra,* at p. 458, 85 S.Ct. at p. 1134.)

And in Montgomery Ward & Co. v. State Bd. of Equalization, *supra,* 272 Cal. App.2d 728, at p. 741, 78 Cal.Rptr. 373, 379, cert. den. 396 U.S. 1040, 90 S.Ct. 688, 24 L.Ed.2d 684, it was stated: " 'The due process clause requires "some definite link, some minimum connection, between a state

and the person, property or transaction it seeks to tax." (Miller Bros. Co. v. Maryland (1954) 347 U.S. 340, 344-345 [74 S.Ct. 535, 98 L.Ed. 747] • • •) The state's action will satisfy the constitutional test "if by the practical operation of a tax the state has exerted its power *in relation* to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." (Wisconsin v. J. C. Penney Co. (1940) 311 U.S. 435, 444 [61 S.Ct. 246, 85 L.Ed. 267] • • •)' [Citations.]" [Emphasis added.] That court further wrote, "The protection afforded and the benefits conferred must have some relationship to the transaction which the state seeks to burden." (Montgomery Ward & Co. v. State Bd. of Equalization, *supra,* at p. 745, 78 Cal.Rptr. at p. 382.)

[3] In the instant case it is true that the Society had in-state activities. However, these activities were so "dissociated" from the out-of-state sales that there is not sufficient nexus between the state and the Society to form a constitutional basis upon which the Society may be required to collect use taxes on the out-of-state sales.

What did the State of California give, in relation to the out-of-state sales, that the state can ask a return by way of requiring the Society to collect the use taxes? The answer is that the state provided no protections or benefits which were related to the out-of-state sales. Many California residents received the Magazine through the federal mail.[3] The Society advertised offerings of the books, maps, globes and atlases in question in the Magazine. The Magazine subscribers were also solicited to purchase these items by circulars received through the mail. After reading about the items in the Magazine ads or circulars, those California residents who chose to do so then ordered the items by mail from an office of the Society in Washington, D. C.

---

[3] As of June 1972 there were 893,000 California subscribers to the Magazine.

Deliveries were made through the mail from either the Washington, D. C. or Maryland Society office. As can be seen, all parts of the transactions were conducted through the federal mail, with the state playing no part and providing no benefits or protections.

However, the question must also be asked whether the Society's in-state activities were connected with the out-of-state sales. No real link may be established between the two. The Society maintained two small offices in California. A function of the secretary and salesman in each office was to solicit local businesses to advertise their merchandise and services in the Magazine. The solicitation of advertisements to appear in the Magazine had no effect upon whether California residents would purchase products of the Society which they saw advertised in the Magazine or in mailed circulars.

The fact that at one time the same type of products were sold in a relatively small amount to individuals over the counter in the two California offices presents no problem as that situation no longer exists. The only place where a California resident could have seen the items advertised was in the Magazine or in mailed circulars indicating that the items could be mail ordered.

The Board asserts that the Society's in-state activities are integrally related to the out-of-state sales in that the advertising which the Society's resident employees solicited for the Magazine created revenue for the Magazine, and the Magazine, in turn, was the basic vehicle used to promote the Society's mail order items and also provided the source of the circulars' mailing list. As discussed above, the connection is too tenuous to provide a constitutional nexus.

There appear to be no opinions presenting factual situations close to that of the case at bench. However, both appellant and respondent rely strongly upon a few cases

containing what they consider to be facts analogous to the instant case. The Board relies upon Nelson v. Sears, Roebuck & Co. (1941) 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888; Reader's Digest Association v. Mahin (1970), 44 Ill.2d 354, 255 N.E.2d 458, cert. den. 399 U.S. 919, 90 S.Ct. 2237, 26 L.Ed.2d 786; and Standard Pressed Steel Co. v. Washington Dept. of Rev. (1975) 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719.

Nelson v. Sears, Roebuck & Co., *supra,* 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888 considered whether an Iowa use tax was constitutionally applied to Sears' mail order business conducted directly between customers in Iowa and Sears' mail order houses located outside of Iowa. Sears was a New York corporation authorized to do business in Iowa, and having 12 retail stores in Iowa. The Supreme Court held that the use tax was constitutionally applied, on the theory that Sears was doing business in Iowa through its retail stores and thereby receiving benefits from the state for which the state had the power to exact a price; and that the mail orders were "not unrelated" to Sears' course of business in Iowa. The court wrote, as to the privilege of doing business in the state: "Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business. Cf. Wisconsin v. J. C. Penney Co., *supra.* Respondent cannot avoid that burden though its business is departmentalized. *Whatever may be the inspiration for these mail orders, however they may be filed, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them.* Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts." (Nelson v. Sears, Roebuck & Co., *supra,* at p. 364, 61 S.Ct. at p. 588.) [Emphasis added.]

The *Sears* case is distinguishable from the case at bench because Sears had extensive in-state activities due to its 12 retail stores in the state, and that local business was related to the out-of-state sales. The 12 Iowa stores no doubt served as advertisement and inducement for local residents to purchase mail order items, which probably were the same or similar to merchandise found in the stores. Both the retail and the mail order operations were related to the same overall sales effort. In the case at bench there is no such relation between the selling of advertising space in the Magazine and the mail order purchase of books, globes, maps and atlases. Additionally, the benefits and protections afforded the 12 in-state retail stores in the *Sears* case must have been extensive. This is not so in the instant case.

Reader's Digest Association v. Mahin, *supra,* 255 N.E. 2d 458 considered whether Illinois could hold Reader's Digest Association liable for collection of use taxes on the mail order purchase of books and phonograph albums by state residents during three months of 1967. The association was not licensed to do business in Illinois and had no office, sales house, warehouse or property in Illinois. It published a monthly magazine which was exempt from Illinois use tax, and also published books and record albums. The books and record albums could not be purchased in Illinois, but were ordered by mail from New York and shipped by mail to the purchaser. The evidence showed that during 1967 Reader's Digest Association solicited orders for the books and records by direct mail solicitation and by newspaper, radio, magazine and TV ads. The purely local advertising consisted of an ad in the Chicago Sun Times, and 305 radio and TV ads over Illinois stations.

Additionally, Reader's Digest Association wholly owned two subsidiaries in Illinois: Reader's Digest Sales and Services, Inc., and Reader's Digest Services, Inc., and held a 51% interest in Quality School Plan, Inc.

Reader's Digest Sales and Services, Inc. was licensed to do business in Illinois and had a Chicago office. The corporation solicited ads to appear in Reader's Digest magazine. Prior to the time period under consideration, the corporation had engaged in the door-to-door sale of records and record players.

Reader's Digest Services, Inc. was not licensed to do business in Illinois, owned no property in Illinois, and had one salesman residing in Illinois. The corporation published education material and a monthly Educational Edition of Reader's Digest.

Quality School Plan, Inc., in which Reader's Digest Association held a 51% interest, was not licensed to do business in Illinois and owned no property there, but had nine salesmen in the state who solicited orders for the Educational Edition of Reader's Digest.

The court there held, "Considering the full benefits flowing to plaintiff's aggregate business from its resident solicitors and local advertising, we find without further examination of the other subsidiaries an adequate basis for use-tax liability." (Reader's Digest Association v. Mahin, *supra,* 255 N.E.2d 458 at p. 460.) In this holding a full reading of the case reveals that the court is referring to the Reader's Digest Sales and Services, Inc. solicitation of ads to appear in the magazine when it refers to "resident solicitors," and that the court is referring to the advertising in the Chicago Sun Times and on local radio and TV stations when it refers to "local advertising."

A comparison of the holding in the *Reader's Digest* case to the facts in the case at bench shows that while the Society similarly has resident employees soliciting ads to appear in the Magazine, there is no local advertising of the Society's products in local newspapers, or on local radio and TV stations as there was in the *Reader's Digest* case. Further, if one goes behind the holding in that case

and considers all the facts presented, it is even more clear that the contacts between the state and Reader's Digest were far greater than the contacts in the case at bench.

In Standard Pressed Steel Co. v. Washington Dept. of Rev., *supra*, 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719, the appellant manufacturer with a home office and manufacturing plant in Pennsylvania and another plant in California appealed from a judgment upholding the imposition of Washington state's business and occupation tax levied on gross receipts of appellant resulting from its sale of aerospace fasteners to Boeing, its principal Washington customer. The appellant had one employee based in Washington, an engineer, whose office was in his home but who took no fastener orders from Boeing, but did consult with Boeing regarding its anticipated fastener needs and followed up any difficulties in the use of fasteners after delivery. The state taxing authorities found that appellant's business activities in Washington were sufficient to sustain the tax. The decision was affirmed on the appeal. The case is cited by defendant Board as applicable in the instant action. However, there is no comparison between Standard's connection with Washington and the Society's connection with California. The following quotation from the case shows this clearly. "The State Board of Tax Appeals found that the activities of Martinson [the appellant's engineer] were necessary to appellant in making it aware of which products Boeing might use, in obtaining the engineering design of those products, in securing the testing of sample products to qualify them for sale to Boeing, in resolving problems of their use after receipt by Boeing, in obtaining and retaining good will and rapport with Boeing personnel, and in keeping the invoicing personnel of appellant up to date on Boeing's lists of purchasing specialists or control buyers. . . . [¶] . . . appellant's employee, Martinson, with a full-time job within the State, made possible the realization and continuance of valuable contractual relations between appellant and Boeing." (Standard Pressed Steel Co. v. Washington Dept. of Rev., *supra*, at 561, 95 S.Ct. at p. 708.) Very definitely, Standard's agent Martinson was directly connected with the sale of its product to Boeing. In our case the Society's agents in California had no connection with the sale of its products. They did nothing to make Californians aware of the Society's products and had nothing to do with solving problems if any arose in connection with those products. Standard Pressed Steel is not in point.

Respondent, Society, relies upon American Oil Co. v. Neill, *supra*, 380 U.S. 451, 85 S.Ct. 1130, 14 L.Ed.2d 1; and Montgomery Ward & Co. v. State Bd. of Equalization, *supra*, 272 Cal.App.2d 728, 78 Cal.Rptr. 373, cert. den. 396 U.S. 1040, 90 S.Ct. 688, 24 L.Ed.2d 684.

The *American Oil Co.* case considered the issue of whether, where a licensed Idaho dealer in motor fuels sells and transfers gasoline outside the state for importation into the state by an agency of the federal government, the state may constitutionally impose an excise tax upon the transaction on the theory that the dealer constructively receives the gasoline in Idaho upon its importation. Although the case dealt with an excise tax on the "dealer" who first "receives" the motor fuel in the state, not a use tax, the court applied the "nexus" test and held that since every phase of the transaction occurred outside the state, neither the fact that the dealer was licensed in the state nor that it performed activities in the state sufficed to uphold the tax. The court held that imposition of an excise tax with respect to an out-of-state transaction entirely dissociated from any in-state activity violated the due process clause. The case is analogous to the Society's situation where there are also in-state activities which are dissociated from the out-of-state sales.

In Montgomery Ward & Co. v. State Bd. of Equalization, *supra*, 272 Cal.App.2d 728, 78 Cal.Rptr. 373, the court

considered whether Montgomery Ward should be held liable for the collection of use taxes on sales of goods delivered on credit at its Klamath Falls, Oregon and Reno, Nevada stores to customers who held charge accounts bearing California addresses.

Montgomery Ward was an Illinois corporation which conducted a nationwide retail sales business with retail stores in California and many other states. There were 21 Montgomery Ward stores and a regional office in California. Because the Reno and Klamath Falls stores were close to the California border, some California residents customarily shopped in those stores. Montgomery Ward carried on a continual advertising program throughout California, Oregon and Nevada by mail, TV, radio, newspapers and magazines, with the border stores in question engaging in local media advertising which impinged on the neighboring California counties.

The court found that the border stores did not receive such opportunities, protection or benefits from California that the state could burden Montgomery Ward's Nevada or Oregon businesses with the collection of use taxes on sales to California residents which were completed outside of the State of California without violating the due process clause.

As to the commerce clause, the court found that California had contributed nothing to the sales but the home residence of the purchaser and a future haven for the goods he purchased out of state. It concluded that the discriminatory imposition of a use tax collection liability unwarrantedly burdened the right of the out-of-state retailer to do business with residents of California.

While the *Montgomery Ward* case differs factually from the instant case, it does illustrate the principle that the taxable transaction must bear some relation to the in-state activities of a business in order for the state to constitutionally impose a use tax collection liability. In the

case at bench, such a relationship between the in-state activities and the out-of-state sales does not exist.

The Society's activities in California are so dissociated from the activities sought to be taxed that there is no justifiable relationship between the two.

The soliciting in California of advertising for the Magazine does not provide the minimal nexus which is required for this state constitutionally to impose use taxes on the Society's mail order sales to California residents.

Judgment affirmed.

TAYLOR, P. J., and ROUSE, J., *concur.*

APPENDIX C

Constitutional and Statutory Provisions Involved

This case involves the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States.

This case also involves California Taxation and Revenue Code, §§ 6201-04, 6362, set forth below:

6201. *Imposition and rate of use tax.* An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this state at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1, 1967, and to and including June 30, 1972, and at the rate 3¾ percent thereafter.

6202. *Liability for tax.* Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State except that a receipt from a retailer engaged in business in this State or from a retailer who is authorized by the board, under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this part relating to the use tax, regarded as a retailer engaged in business in this State, given to the purchaser pursuant to Section 6203, is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

6203. *Collection by retailer.* Except as provided by Section 6292 and 6293 every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state,

not exempted under Chapters 3.5 or 4 of this part, shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease.

"Retailer engaged in business in this state" as used in this and the preceding section means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business.

(b) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

6204. *Tax as a debt.* The tax required to be collected by the retailer and any amount unreturned to the customer which is not tax but was collected from the customer under the representation by the retailer that it was tax constitutes debts owed by the retailer to this state.

6362. *Newspapers and periodicals.* (a) There are exempted from the taxes imposed by this part, the gross

receipts from the sale of, and the storage, use, or other consumption in this state, of tangible personal property which becomes an ingredient or component part of any newspaper or periodical regularly issued at average intervals not exceeding three months and any such newspaper or periodical.

(b) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of a photograph, whether or not produced to special order, when the possession, but not the title, of the photograph is transferred for the purpose of being reproduced one time only, in a newspaper regularly issued at the intervals set forth in subdivision (a) of this section.

APPENDIX D

SUPREME COURT OF THE STATE OF CALIFORNIA

No. S.F. 23295

NATIONAL GEOGRAPHIC SOCIETY, *Plaintiff and Respondent,*

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Defendant and Petitioner.

Notice of Appeal

TO: THE CLERK OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that the National Geographic Society, Respondent in the above-entitled proceeding, is appealing the judgment entered by this Court on April 1, 1976 to the Supreme Court of the United States of America pursuant to Section 1257(2) of Title 28 of the United States Code. (28 U.S.C. § 1257(2)).

DATED: June 17, 1976

HANSON, O'BRIEN, BIRNEY and BUTLER
ARTHUR B. HANSON
BROAD, KHOURIE & SCHULZ
Professional Corporation

/s/ By: EUGENE C. CREW
Eugene C. Crew

Attorneys for the National Geographic Society